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REGULATORY AUTH  **BELLSOUTH**

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333 Commerce Street
Nashville, Tennessee 37201-3300

OFFICE OF THE
EXECUTIVE SECRETARY

Guy M. Hicks
General Counsel

February 25, 1999

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service
Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee*
Docket No. 98-00559

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s
Response to Consumer Advocate Division's Motion to Compel. Copies of the enclosed are being
provided to counsel of record for all parties.

Very truly yours,



Guy M. Hicks

GMH/jem

Enclosure

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee**

*In re: Proceeding for the Purpose of Addressing Competitive Effects of
Contract Service Arrangements Filed by BellSouth
Telecommunications, Inc. in Tennessee*

Docket 98-00559

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE
TO CONSUMER ADVOCATE DIVISION'S MOTION TO COMPEL**

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this response in opposition to the Consumer Advocate Division's ("CAD") Motion to Compel. The CAD's motion is a blatant attempt to circumvent the rulings of the Tennessee Regulatory Authority ("Authority") concerning the scope and conduct of this proceeding. Furthermore, while complaining about the adequacy of the documents BellSouth has made available for review in response to the CAD's discovery requests, the CAD has not yet even bothered to review these documents. Accordingly, the CAD's Motion to Compel should be denied.

II. DISCUSSION

A. First Discovery Requests Nos. 5 & 14.

The CAD seeks to compel BellSouth to identify every BellSouth employee who negotiated any CSA since January 1, 1995 (First Discovery Request No. 5) as well as every individual who reviewed and analyzed BellSouth's billing records to determine those Tennessee customers that should be candidates for service under a CSA (First Data Request No. 14). BellSouth objected to both requests on grounds that the identity of BellSouth employees was irrelevant to the issues in this proceeding.

Although the CAD insists that the identity of BellSouth employees “is necessary for the purpose of taking depositions ...,” CAD Motion at 1-2, the Authority has made no provision for oral discovery. While the Consumer Advocate suggested at the September 2, 1998 prehearing conference that “potential deposition time be built into the discovery schedule,” the Prehearing Officer declined to rule on this suggestion. January 15, 1999 Report and Recommendation at 7. Furthermore, the Prehearing Officer noted that any future request for depositions “might require a showing of need” – a showing that the CAD has not attempted to make. Even if the CAD could make such a showing, which it cannot, the CAD must seek leave to take depositions. The CAD should not be permitted to discover the identity of individuals for depositions when the Authority has not been presented with, let alone granted, any request to allow depositions. Moreover, the CAD's request that BellSouth identify every employee who negotiated any CSA or who reviewed and analyzed related billing periods would impose a substantial and unnecessary burden on BellSouth.

B. First Discovery Request No. 18

In First Discovery Request No. 18, the CAD asked whether each CSA “currently in effect in Tennessee constitutes the entire agreement between the parties, including any BellSouth affiliate? If not, please state whatever agreement exists between the parties, including BellSouth affiliates.” BellSouth's response, which the CAD completely misrepresents, was as follows:

Not necessarily. The terms and conditions of CSAs may be in addition to the applicable terms and conditions in the BellSouth general tariff. In addition, a particular customer may have more than one service-specific CSA. Information responsive to this request is contained in the CSAs themselves, which has been made available by counsel for the parties subject to the protective order entered by the Authority in this proceeding.

With respect to agreements that CSA customers may have with companies affiliated with BellSouth, such as agreements with BellSouth Mobility, Inc. for wireless service or BellSouth Communications Systems, Inc. for customer

premise equipment and maintenance services, this information is not in the possession, custody, or control of BellSouth Telecommunications, Inc. While it is conceivable that at some point in the future CSAs will incorporate services offered by both BellSouth Telecommunications, Inc. and its affiliated companies, there are no such CSAs currently in fact in Tennessee.

BellSouth's response to this discovery request is valid. Producing the CSAs from which the information the CAD seeks "may be derived or ascertained" is completely consistent with the Tennessee Rules of Civil Procedure, since "the burden of deriving or ascertaining" such information is substantially the same for the CAD as it is for BellSouth. *See* T.R.C.P. 33.03. Furthermore, since there are no CSAs currently in effect in Tennessee that incorporate services offered by both BellSouth Telecommunications, Inc. and its affiliated companies, there is no additional information that BellSouth can provide on this issue.

C. First Requests For Admission Nos. 4-11 and First Requests For Production Nos. 1-11

The CAD also seeks to compel BellSouth to respond to a number of discovery requests that were propounded in complete disregard of the discovery limitations imposed by the Prehearing Officer and adopted by the Authority. CAD Motion at 3-6. The CAD does not dispute that it served BellSouth with more than 30 discovery requests during the first round of discovery. Rather, the CAD insists that such limitations should not apply to it because, based on the Davidson County Local Rules of Practice, "limits on discovery requests apply only to interrogatories, not request for admission and request for production of documents." CAD Motion at 3. However, whatever the Davidson County Local Rules may say about discovery is irrelevant because this proceeding is governed by the Prehearing Officer's January 15, 1999 Report and Recommendation, which the CAD neglects to mention.

The Prehearing Officer's Report and Recommendation makes clear that, in the first round of discovery, parties were limited to thirty "discovery requests" including subparts. Report and

Recommendation at 7. Discovery requests are discovery requests, and the Report and Recommendations made no distinction between interrogatories, requests for admission, or requests for production of documents. All the other parties adhered to these limitations, and the CAD should be required to do likewise.

D. Second Discovery Request No. 4

In its Second Discovery Request No. 4, the CAD asked that, for each CSA filed with the Authority since January 1, 1995, BellSouth provide all documents referring or relating to “the criteria that were the basis for the account team’s decision to offer a CSA.” BellSouth agreed to make these documents available, to the extent they exist. However, BellSouth agreed to make the documents available at the locations where they are maintained in the ordinary course and scope of BellSouth’s business, which is completely consistent with the Tennessee Rules of Civil Procedure. *See* T.R.C.P. 34.02 (“A party who produces documents for inspection shall produce them as they are kept in the usual course of business....”). To the extent any documents are maintained in Tennessee, BellSouth has agreed to make them available for inspection in Tennessee, a fact the CAD never mentions in its motion.

Although the CAD complains about the adequacy of BellSouth's response, accusing BellSouth of attempting “to put the outrageous burden on the Consumer Advocate Division of going to different locations in BellSouth's nine states region to run down the documents,” BellSouth has no obligation to produce documents other than where the documents are maintained in the ordinary course and scope of business. *See* Wright Miller and Marcus, 8A Federal Practice and Procedure, § 2214 at 441-443 (“Business records should usually be examined at the place where they are kept”) (footnotes and citations omitted). While the CAD claims that it is an “outrageous burden” to review documents in the locations where they

are maintained in the ordinary course and scope of business, the CAD does not hesitate to seek to impose burdens on BellSouth to gather and produce documents, some of which are not even relevant to this proceeding.

Importantly, while complaining about the adequacy of BellSouth's response, the CAD has made no attempt to review the documents that are already available for inspection in Tennessee and have been for some time. Such inaction on the part of the CAD seriously undermines the CAD's purported need for such documents, and BellSouth should not be expected to disrupt its business in order to gather documents that the CAD may never review.

E. Second Discovery Request No. 6

In its Second Discovery Request No. 6, the CAD asked BellSouth to admit or deny "that the rates charged for some individual service elements under CSAs presently in effect are below the long run incremental cost as computed in the cost studies used by BellSouth to support the CSA filing." BellSouth objected to this request as irrelevant, since the CAD has raised this precise issue in Docket 97-00105.

The CAD does not dispute that the issue of whether or not the price of services provided under CSA is above the incremental cost of providing such service is an issue in Docket 97-01105. Indeed, the CAD simply ignores Docket 97-01105. The CAD also ignores that it previously attempted to consolidate Docket 97-00105 with this proceeding, which was expressly rejected by the Authority when it adopted the Prehearing Officer's January 15, 1999 Report and Recommendation. To the extent that the CAD contends that BellSouth is acting anticompetitively "by providing service at less than incremental cost and recovering the deficiency from a monopoly customer," which BellSouth submits is absurd, the CAD should file

a complaint. However, it should not be permitted to seek discovery on an issue that the Authority has already held is not relevant to this proceeding.

F. Second Discovery Requests Nos. 8-11

The CAD has requested numerous documents concerning BellSouth's CSAs, which BellSouth has agreed to make available for inspection in Nashville and elsewhere. There are literally thousands of pages of documents that have been sitting in a conference room in BellSouth's offices in Nashville for more than three months waiting for the CAD or any one of the other Intervenors to take the time to review them. These documents continue to gather dust, while the CAD (and several other Intervenors) clamor for additional discovery from BellSouth.

While acknowledging that BellSouth has agreed to make available documents in response to its Second Discovery Requests Nos. 8-11, the CAD questions BellSouth's willingness to do so subject to an objection that it would not provide information concerning its "marketing strategy." BellSouth's concern is that the CAD's discovery requests (as well as certain requests by other Intervenors) are exceedingly broad and could be read to encompass documents that refer or relate to BellSouth's current efforts to market its services to customers – the same customers that are being targeted by BellSouth's competitors. For example, if BellSouth is in the midst of competing for the business of a bank with offices throughout BellSouth's region, BellSouth should not be required to turn over documents that contain the efforts BellSouth has employed to get that customer's business, the details of BellSouth's proposals to that customer, or the steps that BellSouth will take to win that business. Disclosure of such information would severely prejudice BellSouth, since it would allow BellSouth's competitors to obtain a competitive advantage in competing for that business. The CAD has interpreted BellSouth's objection more

broadly than it was intended, and the CAD should review the documents BellSouth has agreed to produce before asserting that “BellSouth is not making all relevant documents available.”

In its Motion to Compel, the CAD raises the rhetorical question that “if BellSouth has an anticompetitive ‘marketing strategy,’ what information could be more relevant in a case involving the possible anticompetitive use of CSAs?” CAD Motion at 9. Although the CAD appears concerned about BellSouth's “intent,” such concern is misguided, given the issues to be resolved in this proceeding. These issues focus on the competitive effects of the terms and conditions of BellSouth's CSAs, without regard to BellSouth's “intent.”

G. Second Discovery Requests No. 13

In Second Discovery Request No. 13, the CAD asked that, for every CSA filed since January 1, 1995, BellSouth identify “the central office through which local exchange services is being provided to the customers’ primary location in Tennessee.” BellSouth objected to this request on grounds that providing the information would be unduly burdensome, if not impossible, because it would take hundreds of hours to review billing records and each individual private lines circuits associated with the CSAs to gather this information.

Although the CAD contends that this information is “relevant” to determining whether a CSA customer in fact has a “competitive alternative,” the CAD has other means available to get this information. For example, the documents BellSouth has agreed to make available, which the CAD has not yet bothered to review, contain information about CSA’s customers’ competitive alternatives.

Furthermore, knowing the location of the central office serving the customer is meaningless unless the CAD also knows the areas in which competing local exchange carriers are providing service in competition with BellSouth. The CAD has made no attempt to discover

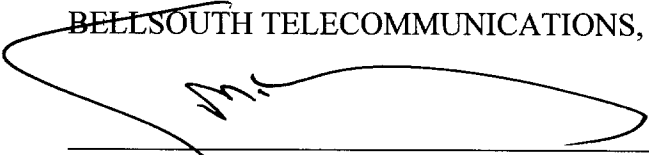
this information from the competing carriers that are parties to this proceeding, let alone from all competing carriers in the State. While BellSouth has attempted to discover where the competing Intervenors are or soon will be providing local exchange service in Tennessee, the Intervenors have objected to providing this information, and the CAD has not weighed in on the issue. Thus, it appears that the CAD is only interested in obtaining information from BellSouth, even though such information would not tell the CAD everything it purportedly wants to know.

III. CONCLUSION

For the foregoing reasons, the CAD's Motion to Compel should be denied.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 1999, a copy of the foregoing document was served on the parties of record via facsimile, overnight, or US Mail, postage prepaid:

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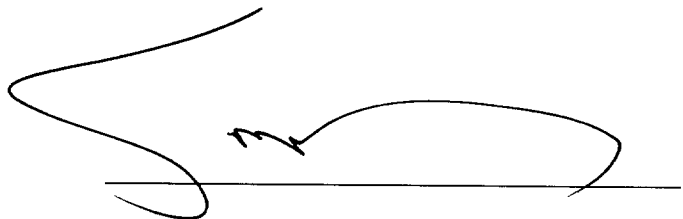
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A handwritten signature in black ink, consisting of a large, stylized 'S' or 'C' shape followed by a horizontal line and a small flourish.